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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 404

JACK DAVIS,

Petitioner,

—vs.—

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Jack Davis, respectfully submits his petition to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above entitled cause on August 8th, 1945, affirming the conviction of your petitioner in the United States District Court for the Southern District of New York.

History of the Case

On August 4th, 1944, an information was filed against the petitioner in the United States District Court for the Southern District of New York, charging him in one count

with the unlawful possession and control of approximately 168 gasoline ration documents of the type denominated "A" in violation of Ration Order No. 5C and General Ration Order No. 8 issued by the Office of Price Administration.

Your petitioner was tried before District Judge, Alfred C. Coxe and a jury on the 10th and 11th days of January, 1945. The jury disagreed.

On February 26th, 1945, a new information, containing four counts was filed against your petitioner, charging violations of the same ration orders (R. 4-6). Petitioner was tried before District Judge Vincent L. Leibell and a jury between the 7th and 9th days of March, 1945. A motion made by your petitioner to suppress evidence obtained as claimed by your petitioner by an illegal search and seizure, was denied by Judge Leibell after a pretrial hearing. The entire minutes of the pretrial hearing are reprinted in the Record.

The jury rendered a verdict of guilty on the first count of the information, which is the same offense upon which the jury had previously disagreed and rendered a verdict of not guilty on the third count. The second and fourth counts were withdrawn upon motion by the Government before the commencement of the trial.

On the 23rd day of March, 1945, your petitioner was sentenced to imprisonment for a term of six months and fined the sum of $1,000 with the direction that your petitioner stand committed until the fine had been paid (R. 191).

Petitioner's conviction was affirmed by the Circuit Court of Appeals in and for the Second Circuit on August 8th, 1945. The opinion of the Circuit Court of Appeals was written by Honorable Learned Hand, Circuit Judge, and the concurring opinion was written by Honorable Jerome N. Frank, Circuit Judge (R. 210).

This petition is filed to obtain a review of the judgment of the Circuit Court of Appeals. The jurisdiction of this

Court is invoked under Section 240a, Judicial Code, 28 U. S. C. A. 347a.

Constitutional Provisions, Statutes and Regulations Involved

The following sections of the Constitution and regulations are involved:

Constitution of the United States, Amendment 4:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the United States, Amendment 5:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Ration Order No. 5C, Section 1394.8153:

> "Transfers to consumers in exchange for coupons, ration checks and gasoline purchase permits—(a) Cou-

pons in books issued for registered and commercial motor vehicles. Transfer may be made and accepted in exchange for coupons contained in Class A, B, C, D, T-1, or T-2 books, only under the following conditions:

* * * * *

(1) At the time of transfer, the transferor must require presentation of the coupon book and must detach therefrom coupons having an aggregate unit value equal to the amount of gasoline transferred: *Provided*, That if the transferee is able to accept only a portion of the amount of gasoline represented by the unit value of a coupon, the transferor shall nevertheless detach an entire coupon. No transfer may be made pursuant to this paragraph in exchange for a coupon detached prior to the presentation of the coupon book to the transferor."

Ration Order No. 5C, Section 1394.8217:

"Records to be kept by dealers and intermediate distributors. (a) Every dealer and intermediate distributor shall be accountable for all gasoline, ration credits, gasoline deposit certificates, coupons and other evidences received by him. Gasoline deposit certificates, coupons and other evidences received at or for a place of business shall be, at all times when the dealer or distributor is open to transact business, retained by him at the place of business for which they were received, or deposited in a ration bank account maintained for that place of business, until such time as they are surrendered to a dealer or distributor in exchange for gasoline, or otherwise surrendered pursuant to Ration Order No. 5C. The aggregate gallonage value of gasoline deposit certificates, coupons and other evidences on

hand or on deposit for each, place of business of a dealer or intermediate distributor, shall, at all times, be equal to, but not in excess of, the number of gallons of gasoline which would be required to fill the storage capacity of such place of business, as shown by the current certificate of registration, except for: * * *"

Ration Order No. 5C, Section 1394.8227:

"All tire inspection records and gasoline deposit certificates and all coupon books, coupons, and other evidences are, and when issued shall remain, the property of the Office of Price Administration. Upon demand made by any investigator of the Office of Price Administration or by any police officer, constable, or other law enforcement officer of the United States or of any state, county, or local government, every person shall produce for inspection any tire inspection record and gasoline deposit certificate and any gasoline coupon books, coupons, and other evidences in his possession or control, whether valid, invalid, void or expired, and whether or not issued or acquired in accordance with Ration Order No. 5C. Investigators of the Office of Price Administration and all police officers, constables and other law enforcement officers of the United States, or of any state, county or local government are authorized to make such inquiries of any person as may be pertinent to determine whether a violation of Ration Order No. 5C has been or is being committed, and are authorized to receive the surrender of all gasoline deposit certificates, gasoline coupon books, coupons and other evidences acquired by any person otherwise than in accordance with Ration Order No. 5C, whether valid, invalid, void or expired."

Ration Order No. 5C, Section 1394.8302:

"Suspension orders. Any person who violates the Ration Order No. 5C may, by administrative suspension order, be prohibited from receiving any transfers or deliveries of, or selling or using or otherwise disposing of, any gasoline, tire or passenger automobile. Proceedings for the issuance of suspension orders shall be instituted and governed pursuant to the provisions of Procedural Regulation No. 4."

Title 50 (App.) U. S. C. A., Section 633 (2)(a)(5):

"Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both."

Summary Statement of Matter Involved

The count upon which the petitioner was convicted charged that your petitioner unlawfully had in his possession and control approximately 168 gasoline ration documents of the type known as "A" in sheet form representing approximately 504 gallons of gasoline and that your petitioner was not the person or agent of the person to whom these ration coupons were issued or by whom they were acquired in accordance with Ration Order No. 5C and General Ration Order No. 8, issued by the Price Administrator.

Your petitioner's conviction was based entirely upon his possession of gasoline coupons introduced in evidence as

Government's Exhibits 4 and 5 (Stenographer's Minutes, 225-227).

The manner in which this evidence was obtained and the rulings of the lower courts in respect thereto, constitute the main ground urged by your petitioner for the granting of this petition for a Writ of Certiorari.

The petitioner is president of a corporation known as Davis Auto Laundry Corporation, which operates a gasoline station in the Borough of Bronx, City of New York. On June 20th, 1944, two detectives, both members of the New York City Police Department, Fitzpatrick and Colby, together with three agents attached to the Office of Price Administration, Sussman, Pearman and Tarter, drove to a place near the petitioner's gasoline station at about 11 o'clock in the morning. For two hours they observed the activities of the service station (R. 69).

These officers and agents had no search warrant and they had no warrant for the arrest of the petitioner.

Two of the agents separately then entered the gasoline station and beguiled an employee, a woman in attendance while your petitioner was not present, to make two separate sales of gasoline at charges in excess of ceiling prices and without demanding coupons (R. 69-70, 96). The employee who appeared as a witness for the government contradicted the testimony of the agents and testified that she first discovered that the agents had no coupons after she had sold the gasoline and requested the coupons (R. 96). She further testified that she was misled by the agents, both of whom pretended to be regular customers of your petitioner and that she would not have sold the gasoline if she had known that the agents had no coupons or if she had not been fooled by their pretended relationship to the petitioner (R. 112).

It is conceded that your petitioner was not present at the time these sales were made.

Your petitioner appeared at the station shortly thereafter. Your petitioner's automobile was searched (R. 93). The agents demanded and received the keys to the tin boxes attached to the gasoline pumps (R. 23). These boxes were opened and coupons counted by the agents (R. 23). One of the agents began examining and measuring the gasoline tanks and their contents (R. 23). Your petitioner was then taken by one of the detectives and one of the agents to a small building approximately 30 feet away from the gasoline pumps (R. 24). This consisted of a waiting room and private office of your petitioner. The door to the private office was locked (R. 24). Your petitioner had given the keys to his partner by the name of Payne (R. 74). For at least an hour, your petitioner was questioned in the waiting room adjoining your petitioner's private office by Detective Fitzpatrick and agent Sussman. They asked for leave to enter your petitioner's private office, which your petitioner refused. The following excerpts in the testimony of government's witnesses are examples of the threats and representations made by the detectives and agents to gain entrance to the petitioner's private office:

Detective Fitzpatrick testified as follows (R. 25):

> "I explained the law to Davis in that I told him that these were Federal agents, 'They have you now for one rap. The rap is the over-the-ceiling prices of gasoline. You are now under arrest, and any property in the office will be seized by them.' I said, 'The best thing to do is to open the door and save a lot of time.'
>
> He wanted to know what would happen to him. I said, 'Well, you have an OPA violation and you have an arrest now, and this is certainly going to be tough, and if you have any more stuff you might as well give it to him.'"

Again on cross examination, Fitzpatrick testified that he told petitioner when the petitioner refused to open the door to the private office "they have a perfect right to look the place over. They are Federal agents and any stuff that you have in regards to this ration currency is their property and you are only custodian of it during the time that it goes through your hands" (R. 41).

Upon the trial Detective Fitzpatrick testified that he warned the petitioner that "he was in the can" (Stenographer's Minutes 275)

Agent Sussman admitted upon cross examination as follows (R. 86):

> "Q. Did you try to convince Davis that he ought to open that door leading into the private office? A. I didn't try to convince him. I told him he would have to open that door."

Agent Sussman also testified that he warned the petitioner that they had a right to go into the private office (R. 87). Apparently, while this was going on, another detective was shining a flashlight through a window into the private office of the petitioner (R. 48). Detective Fitzpatrick himself testified that from where he was sitting it looked as though Detective Colby was trying to force the window in the private office and enter (R. 48).

When the petitioner observed this, according to Government witness, Fitzpatrick, he remarked, "He don't need to do that. I will open the damn door" (R. 48).

Apparently agent Sussman had obtained the keys after the other agent had followed Payne and turned the keys over to petitioner, who allegedly opened the door to the private office (R. 48). According to agent Sussman, the petitioner opened his private safe, took out some manila envelopes

containing coupons and turned them over to him (R. 75). These are the coupons which were offered in evidence against the petitioner upon the trial as Exhibits 4 and 5.

The summary of the testimony appearing in the opinion of the Circuit Court of Appeals is quite adequate except that the issue as to the alleged arrest of the petitioner is not fairly covered (Opinion, R. 210).

The Circuit Court of Appeals in its opinion, writes that the officers arrested the petitioner. The Court points out, however, that the petitioner denied at the trial that he had been arrested but the Court accepted the findings of the trial court that the testimony of the officers was correct.

The facts and circumstances surrounding the alleged arrest of the petitioner deserve special mention. Government witness Sussman testified that after your petitioner returned to the gasoline station after the sales had been made by the female attendant, he told the petitioner that he was under arrest (R. 84). This witness admitted that he did not tell the petitioner the charge upon which he was arrested (R. 84). This same witness admitted that he had no warrant for the arrest of the petitioner (R. 90).

The first time that agent, Sussman ever told the petitioner the charge for which he was allegedly arrested was after he had surreptitiously gained entrance to the petitioner's private office and seized the ration coupons which were offered in evidence against the petitioner upon the trial. At that time, according to this witness, he told the petitioner that he was charged with selling gasoline at above ceiling prices and having unlawful possession of "A" coupons (R. 93). It is therefore apparent that the alleged arrest is based on evidence obtained as a result of the search and seizure.

Certain other facts and circumstances connected with the alleged arrest of the petitioner are not in dispute. There

is no denial that after the alleged arrest of the petitioner, he was not taken to any police precinct or to a United States Commissioner or to any other Committing Officer. Instead petitioner was taken to the Office of Price Administration on the same day where he was questioned for many hours by Mr. Burchill (R. 60, 61) and on the same day the petitioner was released from the custody of the alleged arresting officers and told by this Mr. Burchill to go home (R. 66).

The petitioner was not actually lawfully arrested or arraigned before a Commissioner until about a month later (R. 66).

At the close of the pretrial hearing, the motion to suppress the evidence obtained in the above matter was denied by the Trial Judge (R. 157). The Trial Court held as the Circuit Court of Appeals points out in its opinion, that the search and seizure was consented to by the petitioner (R. 157). The Circuit Court of Appeals in its opinion admits to a doubt as to the correctness of the finding of the Trial Judge and confesses that the circumstances do not warrant the conclusion that the petitioner voluntarily consented to the search and seizure (Opinion, R. 212). The Circuit Court of Appeals also rejected quite vehemently the contention of the Assistant United States Attorney that a general search of the premises of the petitioner was authorized because the coupons were the property of the Office of Price Administration and required by the regulation to be kept open for inspection. Circuit Judge Frank wrote a concurring opinion only for the purpose of underscoring as he stated the rejection of this contention by the Assistant United States Attorney.

Although the Circuit Court of Appeals disapproved of the finding of the Trial Judge and rejected the contention of the Assistant United States Attorney, the Court nevertheless sustained the vicious and very general search and

seizure on the ground that the search was a reasonable search as an incident to a lawful arrest.

Other material facts bearing upon the questions raised by this petition and urged in the court below, will be alluded to from time to time in the course of the petition and the brief accompanying it. Aside from the question of the admissibility of the evidence obtained as a result of the search and seizure, there was a serious doubt as to the guilt of the petitioner. In fact, a previous jury had disagreed as to the guilt of the petitioner upon the same charge. The petitioner took the stand in his own behalf and explained in detail the circumstances surrounding his possession of the coupons represented by Government's Exhibits 4 and 5 (Stenographer's Minutes 430). Petitioner testified that his regular customers left with him their gasoline coupons (Stenographer's Minutes 425). Petitioner in turn gave to each of his customers a receipt specifying the number and type of coupons left with him (Stenographer's Minutes 425-426). These receipts were surrendered upon the delivery of gasoline (Stenographer's Minutes 426-427). The petitioner was corroborated by four of his regular customers including an employee of the Department of Parks of the City of New York and a practicing physician (Stenographer's Minutes 490-497).

Question Presented

1. Were Government's Exhibits 4 and 5 taken from the petitioner as a result of an illegal search and seizure within the prohibitions of the Fourth and Fifth Amendments to the Constitution of the United States?

Reasons for Granting the Petition

The introduction of the evidence of the search and seizure plainly transgressed the constitutional rights of the petitioner. The Fourth Amendment to the Constitution provides no exception in its guarantee of protection. Although the Circuit Court of Appeals in its opinion in this case recognizes that freedom from unreasonable search is one of the basic indispensable privileges of our democratic system of government (Opinion, R. 218), yet the distinctions and qualifications made in the lower Court's decision seriously impair the effectiveness of the protection offered by the Fourth Amendment. It is respectfully submitted that the Court below erred in its determination of the question stated above and applied a rule which is in conflict with the weight of authority and the applicable decisions of this Court.

As will be more fully urged in the brief accompanying this petition, the Court below by this decision and its previous decision in *United States* v. *Lindenfeld*, 142 F. (2d) 829, has created an illusory and indefinable exception to the protection guaranteed by the Fourth Amendment. The Court below itself excuses its apparent departure from the traditional principles and standards governing the application of the provisions of the Fourth Amendment by the statement in its opinion that the ruling decisions of this Court are not entirely harmonious. The lower Court, in its opinion, writes as follows (Opinion, R. 216).

> "It must be owned that the borders of this zone are most impalpable; and at least while the Eighteenth Amendment was in force, the ruling decisions were not entirely harmonious. *Marron* v. *United States*, 275 U. S. 192; *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344; *United States* v. *Lefkowitz*, 285 U. S. 452."

This is not the first time that the lower Court has expressed a doubt as to the proper standard or test to be applied in the determination of the question involved in this case.

In *United States* v. *Poller*, 43 F. (2d) 911, 913, the lower Court admitted that the question to what extent the premises under the direct control of a man arrested may be searched was a troublesome one.

In *United States* v. *Kirschenblatt*, 16 F. (2d) 202, the lower Court limited the extent of the search permissible. However, in a subsequent case, *United States* v. *Gowen*, 40 F. (2d) 593, 598, the Court overruled its own decision in *United States* v. *Kirschenblatt* and justified its action on the decision of this Court in *Marron* v. *United States*, 275 U. S. 192. However, the decision of the lower Court in *United States* v. *Gowen*, 40 F. (2d) 593 was reversed by this Court in *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344. As appears more fully in the accompanying brief, the lower Court still justifies its extension of its own created exception to the generally accepted principles of law, upon the decision of this Court in *Marron* v. *United States*, 275 U. S. 192, although this Court in subsequent decisions has definitely expressed and limited the doctrine applied in *Marron* v. *United States*, 275 U. S. 192.

The lower Court admits that there is confusion between cases in other circuits (43 F. 2d 911, 913) and also admits in its decision in this case that the zone within which a person allegedly arrested for a crime may be searched is undefined (Opinion, R. 216).

Your petitioner respectfully submits that the guarantee of protection against oppressive tactics contained in the Fourth Amendment loses strength and vitality as a result of the restrictive and inadequate distinctions and legal interpretations made in the decision of the lower Court.

It is of paramount importance that the rule or test to be applied to afford the greatest protection should be a rule or test which can be easily applied and understood and which is uniform. If the legal interpretations appearing in the decision of the lower Court are permitted to stand, then searches and seizure by arresting officers would be without any clearly defined or reasonable limitations. A decision justifying so far reaching a search plainly calls, we believe, for a review by this Court.

WHEREFORE, your petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Second Circuit commanding said Court to certify the case to this Court for review and determination as provided by the statutes of the United States, and that your petitioner may have such other and further relief in the premises as this Court may deem proper.

JACK DAVIS,
Petitioner.

By IRVING SPIELER,
Attorney.

Dated, New York, N. Y., September 4th, 1945.

Supreme Court of the United States

OCTOBER TERM, 1945

No.

JACK DAVIS,

Petitioner,

—vs.—

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION

I

Opinions Below

There was no opinion of the District Court.

The opinion of the Circuit Court of Appeals (R. 210) has not yet been reported.

II

Jurisdiction

1. The order for mandate of the Circuit Court of Appeals under review was entered on August 8th, 1945 (R. 219).

2. The jurisdiction of this Court is invoked under Section 347, Subdivision (a), Title 28, United States Code Annotated (Judicial Code, Section 240, Subdivision (a), as amended by the Act of February 13th, 1925).

III

Facts

A statement of all that is material to the consideration of this petition has been set out in the petition and under the appropriate points in the brief. For the sake of brevity, they shall not be repeated here.

ARGUMENT

POINT I

Government's Exhibits 4 and 5 should have been excluded as evidence on the ground that they were obtained as a result of an illegal search and seizure within the prohibition of the Fourth Amendment.

This error was covered by Assignment of Errors III, IV and V (R. 196). The Circuit Court of Appeals has devoted the major portion of its opinion to the consideration of this question (Opinion, R. 210).

The Fourth Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy.

United States v. *Lefkowitz*, 285 U. S. 452;
Byars v. *United States*, 273 U. S. 28.

The law is well settled that general exploratory search of premises at the time of an alleged arrest is unreasonable and prohibited by the Fourth Amendment.

United States v. *Lefkowitz*, 285 U. S. 452;
Go-Bart Importing Co. v. *United States*, 282 U. S. 344;
Agnello v. *United States*, 269 U. S. 20.

Under the applicable decisions of this Court, it is clear that the introduction of the evidence of the search and seizure plainly transgressed the constitutional rights of the petitioner. The evidence sought to be suppressed was found by the agents and detectives in the safe of the locked private office of the petitioner, removed from the immediate place of the petitioner's arrest. The agents and detectives had gained entrance to this office by force and threats and the Circuit Court of Appeals finds that petitioner's submission to the threats of the detectives and agents did not amount to a consent to the search (Opinion, R. 212).

As the Circuit Court of Appeals wrote in its opinion:

> "Davis must have known, under arrest as he was, that the officers were not likely to stand very long upon ceremony, but in one way or another, would enter the office."

The lower Court also rejected strongly the contention of the Assistant United States Attorney that since the gasoline coupons were the property of the Office of Price Administration, the officers were free to force an entrance into any building and seize whatever coupons they might find (Opinion, R. 215).

The question presented by this petition is whether the search and seizure justified by the lower Court to have been made as lawfully incident to the arrest of the petitioner transgressed the petitioner's rights under the Fourth and Fifth Amendments.

This Court clearly answers this question by its decision in *United States* v. *Lefkowitz*, 285 U. S. 452.

In the *Lefkowitz* case, respondents were arrested in the execution of a warrant. After the arrest of the respondents, the officers not only searched their person, but opened and examined and took the contents of desks of two rooms divided by a partition. The searches and seizures were made without a search warrant. This Court held that the arrest of the respondents did not justify a general exploratory search of the premises and therefore the search and seizure was unreasonable.

The facts of the case at bar are stronger. In this case, there was no warrant for the arrest of the petitioner. The agents and detectives had no search warrant. The incriminating evidence was not found on petitioner's person or in his immediate possession or control. The gasoline coupons were in a safe in a locked private office removed from the immediate place of arrest of the petitioner. As the lower Court finds, the agents and detectives gained access to this room by force and threats (R. 212).

It is respectfully submitted that the decision of this Court in *United States* v. *Lefkowitz, supra,* is controlling, and the search and seizure was clearly unreasonable and the lower courts erred in denying the motion to suppress the evidence obtained as a result of the search and seizure.

The lower Court in its opinion justifies the search and seizure upon nice distinctions which are not only untenable as a matter of fact, but contrary to the applicable decisions of this Court. The reasoning of the lower Court is not only doubtful logic, but is calculated to destroy the protection guaranteed by the Fourth Amendment.

Stated categorically, the argument of the lower Court amounts to this:

1. The officers had ocular evidence that petitioner was selling gasoline without coupons.

2. Therefore, the officers knew that somewhere petitioner must have a quantity of coupons corresponding to those which petitioner had not taken from his customers.

3. Such coupons were the direct "means of committing" the crime.

4. Therefore, under the decision of this Court in *Marron v. United States,* 275 U. S. 192, the officers could search any part of the premises under the petitioner's control for these coupons.

If we thus dissect the arguments of the lower Court, the error in the logic becomes crystal clear.

It is true that the agents, as the lower Court finds, had induced a female attendant to sell gasoline without coupons and for prices over the ceiling. It is also true that there is some testimony that the female attendant had stated that in making the sales in that manner she followed the orders of the petitioner. At that point, the alleged offense of selling gasoline without coupons and at over the ceiling prices had been completed. The officers and agents had all the proof that they needed. They were in possession of the marked bills which they had given as a purchase price (R. 69-70, 96).

Petitioner was never arrested for that offense. He was never charged with that offense.

Certainly, the alleged commission of this crime in the presence of the officers did not justify an exploratory search of the safe in the petitioner's private office for gasoline coupons which the lower court held the officers must have known that the petitioner had in his possession.

The lower Court argues that because the petitioner sold gasoline without coupons, that somewhere he must have a quantity of coupons corresponding to those which he had not taken from his customers, for otherwise petitioner would

have been unable to replenish his tanks (Opinion, R. 215).

This reasoning is fundamentally fallacious. It does not necessarily follow that because the owner of a gasoline station makes two sales without coupons that he must have contraband gasoline coupons in his possession. It might mean merely that the gasoline owner could not get as much gasoline as he needed from his supplier for he would have less coupons to surrender. There are dozens of other possibilities. Certainly, the protection guaranteed by the Fourth Amendment to the Constitution should not depend upon the mystic powers of the arresting officers. The lower Court credits the officers with possession of particularly acute minds. Have we a right to speculate and say that the officers must have known that somewhere and in some place the petitioner had contraband gasoline coupons? It is admitted that these coupons were not plainly visible. They were not at or near the gasoline pumps. They were not on top of any desk. They were in the safe of a locked private office removed from the petitioner's place of arrest.

No matter how strong a belief the officers had that there must be contraband gasoline coupons at some place, this was no justification for the very general and vicious search made in this case.

In *Agnello* v. *United States*, *supra*, 269 U. S. 20, 33, this Court wrote as follows:

> "Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause."

The lower Court further justifies the wide search on the ground that the contraband coupons were the direct "means

of committing" the crime. It is difficult to perceive how the alleged possession of contraband gasoline coupons would be the direct means of committing an offense allegedly committed in the presence of officers of selling gasoline without coupons. The distinction made by the lower Court is so fine that clearly any record would come within the test applied by the lower Court. There would therefore be no limitations on searches and seizures and the Fourth Amendment would lose vitality and meaning. Moreover, the argument of the lower Court is circuitous. How did the officers know that the contraband gasoline coupons were the direct means of committing the offense until after they found them? It appears that the lower court attempts to justify the search by what was found which is contrary to the well established principles of law. An arrest may not be used as a pretext to search for evidence.

United States v. *Lefkowitz*, 285 U. S. 452, 467.

The lower Court further seeks to justify the search of petitioner's private office on the decision of this Court in *Marron* v. *United States*, 275 U. S. 192. The *Marron* case must be strictly limited to its own facts. Moreover, the decision in the *Marron* case has been modified and explained by subsequent decisions of this Court.

In *Go-Bart Importing Co.* v. *United States, supra*, 282 U. S. 344, this Court, at page 358 explains its decision in the *Marron* case as follows:

> "Plainly the case before us is essentially different from Marron v. United States, 275 U. S. 192, 48 S. Ct. 74, 72 L. Ed. 231. There, officers executing a valid search warrant for intoxicating liquors found and arrested one Birdsall who in pursuance of a conspiracy was actually engaged in running a saloon. As an inci-

dent to the arrest they seized a ledger in a closet where the liquor or some of it was kept and some bills beside the cash register. *These things were visible* and accessible and in the offender's immediate custody. *There was no threat of force* or general search or rummaging of the place." (Italics ours.)

In *United States* v. *Lefkowitz, supra*, 285 U. S. 452, this Court further explained its decision in the *Marron* case, as follows:

"These searches and seizures are to be distinguished from the seizure of a ledger and some bills that was sustained in the Marron Case. There, prohibition officers lawfully on the premises searching for liquor described in a search warrant, arrested the bartender for crime openly being committed in their presence. He was maintaining a nuisance in violation of the act. The offense involved the element of continuity, the purchase of liquor from time to time, its sale as a regular thing for consumption upon the premises, and other transactions including the keeping of accounts. *The ledger and bills being in plain view* were picked up by the officers as an incident of the arrest. No search for them was made. The ledger was held to be part of the outfit actually used to commit the offense. The bills were deemed so closely related to the business that it was not unreasonable to consider them as employed to carry it on. While no use was being made of the book or papers at the moment of the arrest, they—like containers, chairs and tables for customers, the cash register, glasses and supplies—were kept to be utilized when needed. The facts disclosed in the opinion were held to justify the inference that when the arrest was made

the ledger and bill were in use to carry on the criminal enterprise." (Italics ours.)

In the *Marron* case the petitioner was charged with the offense of maintaining a nuisance. The entire premises and all its contents were part and parcel of the nuisance. Because of the very nature of the crime, everything in the premises became an instrument of the crime. This Court held that the officers could search and seize the things plainly visible by which the nuisance was being maintained.

Clearly, therefore, the *Marron* case is no authority for the search and seizure involved in this case. The gasoline coupons were not plainly visible. They had no connection with the actual crime for which the petitioner was allegedly arrested. They were not in the petitioner's immediate possession and control.

With due respect to the learned lower Court, this is not the first time that the lower Court has misconstrued or misapplied the doctrine of the *Marron* case.

In *United States* v. *Kirschenblatt*, 16 F. (2d) 202, the lower Court limited the extent of the search permissible. However, in a subsequent case, *United States* v. *Gowen*, 40 F. (2d) 593, 598, the Court overruled its own decision in *United States* v. *Kirschenblatt* and justified its action on the decision of this Court in *Marron* v. *United States*, 275 U. S. 192. However, the decision of the lower Court in *United States* v. *Gowen*, 40 F. (2d) 593 was reversed by this Court in *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344. One more point deserves particular mention.

The entire argument of the lower Court is based upon the assumption that there was a legal arrest of the petitioner. It is conceded that the petitioner was not taken on the day of his alleged arrest to any police precinct or to the United States Commissioner. Instead he was taken

to the Office of Price Administration where he was questioned by a Mr. Burchill (R. 60, 61). The petitioner was released from custody on that day and told to go home (R. 66). The petitioner was not actually lawfully arrested or arraigned before a Commissioner until about a month later (R. 66). It is clear therefore, that in the first place there was no lawful arrest of the petitioner to justify any search. The requirements for a lawful arrest are clearly stated in the recent decision of this Court in *McNabb* v. *United States*, 318 U. S. 332, 342, 63 S. Ct. R. 608, 613:

> "Congress has explicitly commanded that 'It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest United States commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial * * *'. 18 U. S. C. §595, 18 U. S. C. A. §595, 48 Stat. 1008, 5 U. S. C. §300a, 5 U. S. C. A. §300a, authorizing officers of the Federal Bureau of Investigation to make arrests, requires that 'the person arrested shall be immediately taken before a committing officer.' Compare also the Act of March 1, 1879, c. 125, 20 Stat. 327, 341, 18 U. S. C. §593, 18 U. S. C. A. §593, which provides that when arrests are made of persons in the act of operating an illicit distillery, the arrested persons shall be taken forthwith before some judicial officer residing in the county where the arrests were made, or if none, in the county nearest to the place of arrest."

The Government is estopped both as a matter of law and as a matter of justice of attempting to justify the search and seizure on the ground of a lawful arrest.

The Government's contention is very clearly answered by the following portion of the opinion of the New York Court of Appeals in *People* v. *Marendi*, 213 N. Y. 600, 608:

> "'Arrest is the taking of a person into custody that he may be held to answer for a crime.' (Code of Criminal Procedure, section 167). The defendant was not taken into custody by Officer Murtha 'that he might be held to answer for a crime,' but only that he might be searched."

In the *Marendi* case, the Court of Appeals also wrote that a person arrested must be informed of the cause of the arrest. A police officer "can not arrest a man for one cause, and, when that is exploded, justify for another. Such a doctrine would be an incentive to the loosest practices on the part of public officers and a dangerous extension of their sufficiently great powers. They cannot be too firmly told that there is no such lawful thing as an arrest without an apparent or disclosed cause, to be justified thereafter by whatever may turn up." (213 N. Y. 600, 610.)

It is respectfully submitted that the decision of the lower Court destroys and renders innocuous the protection guaranteed by the Fourth Amendment. The decision is contrary to the applicable decisions of this Court. The decision of the lower Court plainly calls, we respectfully submit, for a review by this Court.

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers to the end that rights under the Constitution of the United States should be preserved, and accordingly a writ of certiorari should be granted and the Court should review and reverse the decision of the Circuit Court of Appeals for the Second Circuit.

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